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In re Application of
Rasmussen
Application No. 09/926,310
Filed October 11, 2001
Attorney Docket No.: 3330
For: FOOD PRODUCT WHICH
ARTIFICIALLY HAS BEEN GIVEN A
CELL-LIKE STRUCTURE BY
COEXTRUSION OF SEVERAL
COMPONENTS, AND METHOD AND
APPARATUS FOR MANUFACTURING
SUCH FOOD PRODUCT

ON PETITION

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OFFICE OF PETITIONS

In re Application of
Rasmussen
Application No. 10/787,214
Deposited: February 27, 2004
Attorney Docket No. RASMUS 9.0-001
For: FOOD PRODUCT WHICH
ARTIFICIALLY HAS BEEN GIVEN A
CELL-LIKE STRUCTURE BY
COEXTRUSION OF SEVERAL
COMPONENTS, AND METHOD AND
APPARATUS FOR MANUFACTURING
SUCH FOOD PRODUCT

This is a decision on (1) the petition requesting that application no 10/787,214 be accorded a filing date of February 27, 2004 as a CPA of application no. 09/926,310 and (2) the petition requesting that application no. 09/926,310 be revived under 37 CFR 1.137(a) so that a CPA could be filed. Both petitions were filed on July 30, 2004 (certificate of mailing date July 26, 2004).

The petition, treated under 37 CFR 1.53(e), to accord application no. 10/787,214 a filing date of February 27, 2004 as a CPA of application no. 09/926,310 is **DISMISSED**.

The petition under 37 CFR 1.137(a) to revive application no. 09/926,310 so that a CPA could be filed is **DISMISSED**.

Petitioner is given TWO MONTHS FROM THE DATE OF THIS DECISION within which to request reconsideration. Extensions of time may be obtained by filing a petition accompanied by the extension fee under the provisions of 37 CFR 1.136(a).

A Notice of Allowance and Fee(s) Due was mailed in application no. 09/926,310 on December 1, 2003. Petitioner filed a 312 amendment on February 12, 2004.

Application no. 10/787,214 was deposited on February 27, 2004 without a specification. Accordingly, on May 24, 2004, the Office mailed a Notice of Incomplete Nonprovisional Application, stating that the application had not been accorded a filing date and that the filing date will be the date of receipt of the specification.

The instant petitions were filed on July 30, 2004.

PETITION UNDER 37 CFR 1.53(E) IN APPLICATION NO. 10/787,214

Petitioner explains that the former attorney of record, William J. Daniel, intended to file a CPA of application no. 09/926,310 on February 27, 2004, but used an out of date transmittal form intended for use in filing an application under 37 CFR 1.53(b). Mr. Daniel modified the 1.53(b) form and requested that the Office utilize the file wrapper and contents of prior application no. 09/926,310 and abandon application no. 09/926,310 as of the filing date of the present application. However, Mr. Daniel did not type the word "CPA" anywhere on the form. It is noted that the Preliminary Amendment referred to the application as a "new CONTINUATION application." The Office properly processed the application as a 37 CFR 1.53(b) application.

Even if the papers filed on February 27, 2004 were considered a CPA, petitioner is informed that effective July 13, 2003, CPA practice was eliminated as to utility and plant applications. *See Elimination of Continued Prosecution Application Practice as to Utility and Plant Patent Applications*, Final Rule, 68 *Fed. Reg.* 32376 (May 30, 2003). Any request for a CPA filed on or after July 14, 2003 in a utility or plant application is improper, regardless of the filing date of the utility or plant application in which the CPA is filed. MPEP 201.06(d).

In short, applicant can not file a CPA. The petition under 37 CFR 1.53(e) is dismissed.

PETITION UNDER 37 CFR 1.137(a) IN APPLICATION NO. 09/926,310

A copy of the petition filed in application no. 10/787,214 will be placed in the file of application no. 09/926,310 to complete the record of application no. 09/926,310. Without it, the 137(a) petition is incomplete.

Petitioners request revival of parent application no. 09/926,310 in order to retain copendency between it and child application no. 10/787,214. This is possible.

Application no. 09/926,310 became abandoned for failure to timely pay the issue fee within three (3) months of the mailing of the December 1, 2003 Notice of Allowance and Fee(s) Due. Accordingly, this application became abandoned on March 2, 2004. The filing of the instant revival petition precedes the mailing of A Notice of Abandonment.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c). The instant petition lacks item (3).

Regarding (3) above, petitioners have not shown to the satisfaction of the Commissioner that the entire delay from the due date of the reply to the filing of a grantable petition was

unavoidable.

The Commissioner may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable". 35 USC § 133. Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word unavoidable ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)(the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a). Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

Petitioner knew that the issue fee was due on March 1, 2004. Petitioner did not pay the issue fee. Petitioner attempted to file a CPA when that it was not possible. Therefore, a proper reply was not filed in a timely manner. A delay resulting from the lack of knowledge or improper application of the patent statute, rules of practice or the MPEP does not constitute an "unavoidable" delay. See Haines v. Quigg, 673 F. Supp. 314, 317, 5 USPQ2d 1130, 1132 (N.D. Ind. 1987), Vincent v. Mossinghoff, 230 USPQ 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 USPQ 1091 (D.D.C. 1981); Potter v. Dann, 201 USPQ 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

The petition under 37 CFR 1.137(a) is dismissed.

RECOMMENDED ACTION

Petitioner should provide a copy of the parent application **in application no. 10/787,214** in response to the May 24, 2004 Notice of Incomplete Nonprovisional Application, along with

an explanation as to why petitioner was delayed in responding to the Notice. The application will be accorded a filing date as of the date of receipt of the specification, claims, and drawings.

Then petitioner should file a petition to revive under 37 CFR 1.137(b) **in application no. 09/926,310**. As long as application no. 10/787,214 is deemed complete and has a filing date before application no. 09/926, 310 patents, the two applications will have copendency.

Further correspondence with respect to these petitions should be addressed as follows:

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Application no. 10/787,214 will be returned to the Office of Initial Patent Examination to await receipt of the specification, claims, and drawings from the parent application and an explanation as to why petitioner was delayed in responding to the May 24, 2004 Notice.

Any inquiries pertaining to this decision may be directed to the undersigned at (703) 308-6712.



E. Shirene Willis
Senior Petitions Attorney
Office of Petitions